No. 15,082

United States Court of Appeals

For the Ninth Circuit

CITY OF ANCHORAGE, a Corporation,
Appellant,

vs.

RICHARDSON VISTA CORPORATION and PANORAMIC VIEW CORPORATION,
Appellees.

Appeal from the District Court for the District of Alaska, Third Division.

REPLY BRIEF OF APPELLANT.

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INTRODUCTORY RESTATEMENT OF THE CASE.

This case is not as difficult as the detailed Briefs and Arguments before this Court might indicate. Briefly, the facts, issues and contentions are as follows:

The City of Anchorage Electrical Utility serves each of the appellees' thirty-three buildings, spread over 40 acres, with house power. The City bore the expense of the distribution system and placed a meter in each building on the meter panels provided by the appellees. The wiring and distribution system are "typical" (R-282).

The City Rate Schedule stated that Schedule C was for "establishments" not classified as single family residences. The published schedule is silent on conjunctive metering or billing. However, from 1925 to the time of the trial, there had never been an instance of combined billing or metering for any city customer with separate service drops—i.e., separate points of delivery and separate meters, situated similarly to appellees'.

The appellees each contend: (a) That their multiple buildings are an "establishment" entitled to have all meter readings combined as though there was one meter and one point of delivery; and (b) discrimination.

The District Judge apparently found that appellees were entitled to conjunctive billing unless the multiple meters were installed at appellees' request.

The Appellant City contends that:

1. The City practice of not combining meter readings has been expressly approved by many courts and utility regulatory commissions.

2. The Trial Judge found the practice and classifications of the City to be reasonable when the City defined "establishment" as being one point of delivery with one meter.

3. All other consumers similarly situated were treated the same. There was no discrimination proved or found.

4. Conjunctive billing will not be permitted under the law unless an express provision for the

same is made in the tariffs of the utility—and no express provision exists. The absence of a conjunctive billing rider in a schedule means conjunctive billing will not be permitted.

The Trial Judge, however, decided that because the appellees could save money with combined metering or billing, they were entitled to the same, retroactively.

It is submitted that the fact it cost the appellees more than an admittedly reasonable practice, definition and classification, is not a basis in law for ordering the repayment of money. There must be a finding that for one reason or another the differential in cost was unlawful before there will be judicial intervention. These reasons in the reported cases are: (a) discrimination, and (b) unreasonable rate or classification. These were not found; therefore, the judgment cannot stand.

The collateral issues are:

a. Appellant was deprived of a jury trial;

b. The opinion of the Judge was insufficient in findings of facts and conclusions of law. (Damages, injunctive relief, item (c) infra, etc.):

c. The Trial Judge, in effect rewrote the Utility Schedule, and applied the same retroactively, by creating and defining a new (but inadequate) combined billing rate schedule, conditioned upon who *requested* multiple meters. The Trial Judge failed to find (in the case at bar) this precise point; and

d. Judicial rate making is improper.

Although appellant does not believe that appellees have reasonably met the issues, an abundance of caution and the disastrous effect of the decision on the financial solvency of the City Utility dictates a somewhat detailed answer to appellees' brief.

NOTE: *As of date of mailing this brief to printers, August 30, 1956, Appellant has not received printed copy of appellee, Richardson Vista brief; therefore, all references herein to "Appellee's Brief" refer to brief submitted by appellee, Panoramic View Corporation.*

(A) APPELLANT DID NOT MISLEAD THE COURT (IN ANSWER TO APPELLEE'S FOREWORD).

The appellee, Panoramic View, in its brief on page 5 suggests that the appellant has misled the court in regard to the status of Ordinance 55. Appellee suggests that appellant "perhaps inadvertently" caused the court to believe that the ordinance remained in effect subsequent to its repeal in 1949. It is upon that basis that appellee felt it necessary to restate appellant's statement of the facts (see page 5, Appellee's Brief).

Appellant does not believe that it, in any manner, misled this court or failed to state the true facts. On page 10 of appellant's opening brief, in its statements of facts, appellant said:

> "At the time of trial it was shown that Ordinance 55 had in fact been repealed by Ordinance 283 in 1949 (Exhibit 10). It also appears that no

other similar ordinance was enacted by the City of Anchorage, although rate schedules were published in the City of Anchorage telephone directory."

Appellant also in its statement of facts set out verbatim the opinion of the Trial Judge, George W. Folta, which on no less than three occasions makes mention of the fact of repeal of Ordinance 55. See the opinion in *Appellant's Brief,* page 13, in which the District Judge, in referring to sections of Ordinance 55, states as follows:

"The sections containing these provisions had, however, been repealed on August 24, 1949, by Ordinance No. 283, without a reenactment of these provisions."

See further in the judge's opinion, on page 14 of *Appellant's Brief,* where the Trial Judge stated as follows:

"Although it may be inferred from the testimony that the repeal of the provisions of Ordinance No. 55 was inadvertent and that the City Council and officials were ignorant thereof, . . ."

Later, also in the judge's opinion, on page 14 of *Appellant's Brief,* where the District Judge stated:

"It is conceded that after Ordinance No. 283 became effective no rule or regulation was adopted prohibiting conjunctive billing and plaintiffs argue that in the absence of such a rule or regulation the practice referred to was unauthorized. . . ."

Appellant in its brief makes frequent reference to the fact that Ordinance 55 had been repealed and on page 33 of *Appellant's Brief* it is stated:

> "At the onset it must be admitted that Ordinance 55 (prohibiting conjunctive billing except when the facilities are independently metered for the convenience of the utility consumer) was repealed in 1949 (Exhibit 10). The appellees interpret this to the effect that because this provision was repealed such a practice is now approved. . . ."

Appellee's suggestion that appellant misled the court is not well taken.

(B) APPELLANT'S UNIFORM AND NON-DISCRIMINATORY POLICY AND PRACTICE CONCERNING BILLING IS SUPPORTED IN THE RECORD AND RECOGNIZED BY THE TRIAL JUDGE (IN ANSWER TO APPELLEE'S FOREWORD AND ARGUMENT (AT PAGE 30)).

Appellee in its Foreword and Argument (page 30 of Appellee's Brief) stated the City of Anchorage had no established policy or practice relative to conjunctive or combined billing. Appellee's statement of facts on page 13 of its brief states as follows:

> "The record further shows that appellee corporations operated the first establishments of their kind in Anchorage, Alaska, subsequent to the repeal of Ordinance No. 55, and no similar operation came into existence after the repeal of Ordinance No. 55 and before appellee's operation commenced upon which the establishment of such a policy could be based (R-226-230).

"*Evidence of any such policy or practice can be found nowhere in this record to support appellant's statements* that it had such a policy after repeal of Ordinance No. 55, and it is stipulated in the record that appellee corporations were charged in accordance with defendant's Exhibit A, based upon defendant's Exhibit C, the rate schedule and that there was no other published rate schedule or regulation other than that contained in Exhibit C and as subsequently promulgated and published as set forth in Exhibits C, D, E, F, G." (R-85-98) (Emphasis supplied).

"Evidence of any such policy or practice can be found nowhere in this record to support appellant's statements that it had such a policy after repeal of Ordinance No. 55, . . . (See Appellee's brief, page 14).

"Accordingly, we submit that the trial court did not have before it any evidene from which it could have made any Finding of Fact that the appellant City had any practice or policy other than that contained in published rate schedules." (See Appellee's brief, page 35).

To use the words of the Trial Judge, appellant will not "quibble" with appellee whether it wants to use the words "policy or practice". (R-364). The policy and practice to which appellee and appellant have reference is that practice whereby the City of Anchorage has never permitted any consumer having two or more electrical utility meters to combine the same, adding the total kilowatt hours consumed and then applying this consumption to a rate schedule. The refusal of the City of Anchorage to so combine meters or to con-

junctively bill has at all times been in effect, irrespective of whether or not a particular consumer's meters were on the same building, located on different buildings on the same tract of land, within the same general power schedule, or otherwise. Appellant made the statement before and will make it again that the evidence in this trial showed that since 1925 there has never been an instance where the City of Anchorage combined two or more meter readings under any circumstances, including the circumstances of appellee. There is absolutely no testimony in the record to contradict this. The consistent policy and practice is supported by the record in many places.

It is submitted that the practice of the City from 1925 until August of 1949 is shown by Ordinance 55 (Exhibit 10). As noted in the record on page 319 and on page 2 of Appellee's brief, Ordinance 55 was repealed during the time that attorney for one appellee, John Hellenthal, was attorney for the appellant. The City of Anchorage, in the process of codification of its ordinances, repealed Ordinance 55 and no ordinance was ever enacted to replace the same.

> The code was "enacted by the City Council and effective chapter by chapter from January 1948 until April, 1950; enacted as an entire code April 12, 1950." (See the City of Anchorage General Code over the signature of John S. Hellenthal, Attorney, certified by the City Clerk on the 12th day of June, 1950.

Chronologically, the evidence of policy of the City of Anchorage in refusing to combine meter readings is as follows:

1. **1925 to August 1949 (Evidence of Policy and Practice).**

Ordinance 55 (Exhibit I) prevented combined or conjunctive billing (unless for the convenience of the Utility).

2. **1946 to date of trial (Evidence of Policy and Practice).**

The pertinent testimony commences on page 363 of the record. Witness Nichols was the City Comptroller (R-363), having charge of billing for the City Electrical Utilities. He has been in charge of the billing department for the City Electrical Utility since 1950 and has personal knowledge of all billing practices since that time (R-363). Mr. Nichols testified:

> "It has been our practice to rate each meter individually. By that I mean whether a customer has one or twenty meters each meter is rated individually. We start at the top rate and work down again rating them through regardless of location." (R-365).

(Starting at the top and working down has reference to applying a given number of kilowatt hours to a declining rate schedule.) In 1946, 1947, 1948, 1949, 1950 and 1951 there were two-story apartment buildings located in the City of Anchorage served by the City Utility under exactly the same physical circumstances as appellee. These were the Alaska Housing Authority projects in the City of Anchorage (R-365). There were approximately sixteen apartment units in each building, (R-365) and each apartment unit had a separate *electrical* meter (R-366). There was also one meter for each of the apartment buildings for "house" power consumed (R-366). Mr. Nichols testified as follows:

"Q. And what was the policy in regard to billing of the house meters?

A. Those units were erected in 1946 and as far as I can determine from the meter books they have been rated individually since that time.

Q. Now, since you came with the City, are you able to say they definitely have been metered individually?

A. Yes.

Q. What do you mean so far as you are able to determine from the meter books?

A. Our billing record is a meter book which contains the location and the meter readers put in the number and subsequent readings on that. Each one is rated as individual meters.

Q. Then, according to the City records, as to billing, the same policy has been followed since your employment by the City, at least it was followed in the case of Alaska Housing Authority units prior to your coming and up to 1946, is that correct?

A. Yes, sir." (R-366).

To establish the policy of the city as being uniform despite whether the same was commercial or domestic service the following portions of the record are submitted:

"Q. Mr. Nichols, a person coming under domestic services, how many persons do you have that have multiple meters?

A. Under domestic services?

Q. Excuse me, under commercial services first?

A. Under commercial services we have 90 and that varies from 2 to 17 meters per establishment

and those establishments are situated either under one roof or on adjoining pieces of property and limited to 3 city lots in size.

Q. And how about domestic services?

A. Domestic services, there are 95 having from 2 to 11 meters, under the same geographical conditions.

Q. And of other classifications there would be 15 or 18 more persons?

A. 19.

Q. 19 more persons that would have combined meters?

A. Yes." (R-368-9).

There are in all approximately 600 customers of the City Electrical Utility which have multiple meters (R-369).

"Q. *And on any of those are the meter readings combined for the purposes of computing the applicable rate?*

A. *No sir.*" (R.-369) (Emphasis supplied).

See also the *excellent* cross-examination of Nichols (R-370-372).

3. November 10, 1951 (Evidence of Policy and Practice).

See Exhibit "K" being the council minutes for the City of Anchorage of that date. Said minutes state:

"Mr. John Hellenthal representing the Anchorage Rental Service requested that the Council consider the matter of combined reading of electrical energy for the 33 buildings on Government Hill known as *Richardson Vista and Panoramic View Housing Projects.* At the present time each building is billed for electrical energy on a unit basis

for each building, whereby considerable savings could be realized if electrical consumption for all the buildings were totaled and billed. . . .

"It was determined that the request, if granted, *would alter the established policy of billing electrical energy* for each individual building and thereby also affect many others who own more than one building in the community and are being billed on a separate unit basis. . . .

"It was moved by Hoppin and seconded by Axford that the City Manager make a study of the number of large electrical consumers who would be affected, together with the loss in revenue if the method of electric billing as requested by the Anchorage Rental Service is put into effect. All voted in the affirmative." (Emphasis added).

4. 1954 (Evidence of Policy and Practice).

According to plaintiff's witness Heman B. Sarno who in 1954 acquired an interest in some of the properties here under discussion, he had during that year conversations with a Mr. McKinley of the City Electrical Department (R-239).

"Q. Now, when you went to Mr. McKinley and the City people and asked for combined billing, what did they tell you about that?

A. They said they wouldn't do it.

Q. They said they had a policy against it, didn't they?

A. No, they never. I never heard the word 'policy' mentioned, ever. . . ." (R-258).

"Q. Didn't Mr. McKinley say, 'Our policy is not to combine. If we combined them for you we would have to combine them for everybody else'?

A. Mr. Rader, the policy was never mentioned as such. I assume the way he said it that it was their policy, apparently, but the word 'policy' was never mentioned. He said, *'We can't do it for you because we would have to do it for everybody else.'* " (R-259) (Emphasis added).

It is submitted that the record is replete with evidence of a continuing practice and policy by the City of Anchorage from 1925 up until the time of this trial. It is submitted that the District Judge recognized this to be a fact when he stated:

"The City contends that the installation and maintenance of a separate service drop and meter at each building warrant the classification made and *points to the fact that all identical housing projects, as well as more than 200 multimeter consumers within its corporate limits, are similarly dealt with.*" (Opinion of the District Judge, R-45) (Emphasis supplied).

The second half of the sentence is in effect a finding of fact of City policy and practice. See also the opinion of the District Judge (R-48):

". . . and plaintiffs argue that in the absence of such a rule or regulation *the practice* referred to was unauthorized. . ." (Emphasis supplied).

". . . (2) if so, whether *the practice* conflicts with Schedule (C). . ." (Emphasis supplied).

". . . it follows that the City was not required to make *such a practice* the subject of a rule or regulation" (R-48) (Emphasis supplied).

It is submitted that the record supports a finding of policy and uniform practice and the Trial Judge rec-

ognized the same, appellee's brief to the contrary, notwithstanding.

Appellees started this lawsuit arguing discrimination, i.e., non-uniformity in billing procedures. Their proof failed and the Trial Judge did not find any discrimination. Appellees say there is no evidence of uniform practice and policy, yet appellees could produce not *one* instance where the practice or policy was not uniform. If appellees could have produced such an instance, perhaps they could have thereby proved their allegations of discrimination.

But they couldn't, didn't, and failed. All similar housing in the City of Anchorage was wired and billed precisely as were appellees' (R-207, 208, 209, 211 through 230, 365, 366, 368 through 373).

I.

CONTRACT AND ESTOPPEL THEORIES OF APPELLEE ARE NOT PROPERLY BEFORE THIS COURT.

Appellee in its statement of facts, on page 7 of its brief, sets out its contentions. These contentions are that the power used by the house meter should be combined and the declining rate applied thereto in accordance with (a) the published rate schedule, and (b) *"the prior agreement of the City that it would do so. . ."* Appellee then proceeds to recite testimony (pp. 10, 11, 12, 13 of appellee's brief) of one Mrs. Hall who testified for appellee. Mrs. Hall spent a good deal of time in the trial attempting to create an *agreement* between appellees and appellant, whereby appellant

agreed to combine meter readings (*one consumer* and *one establishment*, see pages 10, 11 of appellee's brief, quoting testimony of Mrs. Hall).

Appellee in its brief again makes reference to a supposed agreement with the City of Anchorage, on page 11, as follows:

> "It was at once apparent that appellant City had not only abrogated the *agreement* it had heretofore made with reference to combined billing but had completely disregarded its own published rate schedule" (Emphasis supplied).

On page 13 of appellee's brief is a discussion also of "their agreement".

Appellee in its summarized undisputed facts, No. 4 on page 21 (which "facts" incidentally are not "undisputed") states:

> "*Agreement* of qualified and authorized City officials prior to commencement of operation of project to treat appellee as one customer (but one bond required to guarantee payment by appellee for house power used by it rather than 14 bonds which would be the case if appellant City treated each of the 14 buildings as single 'ownerships'. . ."

Again, on page 22 of appellee's brief, in its further "undisputed" facts statement, appellee characterizes its law suit as being:

> "Commencement of suit in equity for injunction to enjoin City from continuing billing practice not in accord with published rate schedule, and in violation of published *contract* and *separate agreement* to prevent discrimination against plaintiffs and to recover the difference between

> the rate paid under protest and the most favorable rate as published" (Emphasis supplied).

Throughout appellee's arguments frequent reference is made to the "agreement" with the City of Anchorage. See appellee's brief, on page 36, where appellee states:

> "This argument is very difficult to follow because all appellee corporations ask is that they be charged in accordance with the published rate schedule and in accordance with the *agreement* which was made with appellee corporations by the City's representatives at the time of the commencement of occupation of these projects."

See also appellee's brief, page 19, "meeting of the minds." The appellee then states, on page 14 of his brief:

> "No evidence was introduced by the appellant City to contradict the testimony of Mrs. Hall. Neither Mr. Sharp who was then City Manager, or Mason Lazelle, who was then the City Electrical Superintendent, was called as a witness by the City, although the City had been fully aware for months of the pendency of this action."

It is submitted that appellees know quite well why appellant did not answer the testimony introduced by appellee concerning an "agreement" with prior city officials. *Appellee did not plead any such agreement or contract. Appellees did not plead estoppel* but yet appellees brought into the courtroom, at the time of trial, a woman purportedly repeating conversations with city officials approximately four years prior. It

must also be noted that the record shows that the persons with whom Mrs. Hall had conversations were no longer with the City of Anchorage. The impossibility of meeting such evidence on short notice is apparent. Such evidence would certainly have been met, however, had appellees pleaded the same. Appellees did not plead the same for reasons best known to themselves.

This Court may have cause to wonder why Judge Folta did not take into consideration these so-called "admitted agreements" which are urged upon this Court by appellee. Judge Folta did not dignify this claimed agreement by his opinion other than to say:

> "It appears . . . the plaintiffs *discussed* the matter of rates with some of the officials of the City with the view of obtaining the benefit of conjunctive billing" (R-46) (Emphasis supplied).

If this Court is interested in the reliability of the testimony of Mrs. Hall on which this agreement, so to speak, is largely predicated appellant would merely refer to the record. Mrs. Hall's testimony is full of inconsistencies, impossibilities, fantasies, and evasive answering of questions put to her. Appellant does not see the value in analyzing in detail Mrs. Hall's testimony for this Court for the reason it appears to appellant to be obvious that appellees cannot recover on the same, because of their failure to plead the basis for any such recovery, and the further fact that the District Judge refused to dignify or find any such agreement as a fact.

Perhaps appellee has cited this testimony in an effort to create "equities" of some type or another,

hoping to create an illusion of unfairness on behalf of the City.

This inference of unfairness is absolutely unjustified in the record. What actually happened was that construction of the buildings was commenced in 1949 and the apartment units were initially occupied, or occupancy commenced in *July* of 1951 (R-175). Mrs. Hall did not even go to the City Manager relative to this one customer proposition and "agreement" until "the early part of August" of 1951 (R-165, R-189).

When Mrs. Hall talked to the City Manager the meter panels had already been placed (R-189). There was already a spot on these panels for appellee's house meter (Appellee's brief, page 6).

Mrs. Hall refers to letters guaranteeing utility services from the City of Anchorage (R-181). Appellant demanded that the same be produced (R-184). The record will show that they were never produced. Mrs. Hall referred to corporate minutes (R-164) from which she had "refreshed" her recollection. Appellees could not produce these. Mrs. Hall also refers to conferences in which minutes were taken (R-195-197). A demand was immediately made to produce the minutes of those conferences (R-185-197).

Mrs. Hall suddenly decided, on redirect examination, after the notice to produce on cross-examination, that maybe she didn't have any such minutes (R-234-235), although Mrs. Hall said when she left the employ of appellee corporation in 1954 she had a firm recollection of the minutes (R-196-197) taken in 1951, and

could not testify as to the National Electrical Code without checking the same (R-197).

It appears that no "minutes" were ever actually taken but that there were only "work check lists" (R-235) which customarily were not preserved.

The testimony of Mrs. Hall was erroneous in some instances and subject to suspicion in all instances.

II.

THE ARGUMENTS OF APPELLEE IN ANSWER TO APPELLANT FAIL TO MEET APPELLANT'S POINTS WITH EITHER LOGIC OR AUTHORITY.

(A) Appellee fails to meet the Appellant's argument and showing of a consistent Practice and Policy (Page 30, Appellee's Brief).

Appellee commences its arguments in answer to appellant on page 29 of its brief. Its first answer to appellant concerns the failure of appellant to have a policy or practice, and appellee quibbles with the findings of the judge concerning the practice or policy of the city relative to conjunctive billing (See previous argument). Appellant will not repeat the previous argument but it will suffice to say that appellee, in the lower court, attempted to prove discrimination, in an attempt to prove some variance in the treatment of consumers by the City of Anchorage with reference to its billing practices and procedures.

The appellees could find no such instance and submitted no proof of any such instance. Perhaps it was an overabundance of caution which caused the appel-

lant to take the affirmative in this matter when, at the conclusion of the appellees' case, no variance had been shown. Stated in a somewhat different manner, it was impossible for the appellees to negate any such policy or practice and show discrimination; therefore, the appellant showed positively there were no variances in the practices of the City.

Appellee insists that the District Court did not find any policy to be a fact. In a previous argument in this brief the appellant has pointed out to the Court the references in the opinion of Judge Folta, indicating a finding of fact on this precise point, and will now only say, in addition, the failure of the judge to find any discrimination or variance is persuasive that the policy existed and was followed consistently.

(B) Appellee fails to meet Appellant's argument to the effect that conjunctive billing will not be permitted unless provision is made in the Rate Schedule for the same (Page 35, Appellee's Brief).

Appellee cites, on page 18 of its Brief, the testimony of its witness Rutherford to the effect that in his *opinion* there was nothing published in the Anchorage rate schedule which would *prohibit* the conjunctive and combined billing that appellees desire. Mr. Rutherford's opinion of the right of appellees to have conjunctive billing under the rate schedule of appellant invaded, somewhat, the province of the Court. (Note: Rutherford was *not* qualified as a rate expert, R-280). That is the precise question under litigation.

As cited in appellant's opening brief (and unrebutted in Appellee's brief, p. 35, et seq.) the law is

to the effect that conjunctive billing will not be permitted unless affirmatively provided in the schedules. The fact that no reference is made to conjunctive billing in a particular schedule is of itself the best evidence the practice is not permitted. Actually, what appellees seek is a rate which is not provided by the rate schedule. They seek in effect a *new, retroactive rate* and argue they are entitled to a *new rate* not specified in the rate schedule because the *new rate* is not expressly prohibited although the consistent practice and policy of the City has been to prohibit the same. (Conjunctive or combined billing would create a *new rate.* See R-298, 299, 300, 301, 302, 411).

(C) Appellee fails to meet Appellant's argument that there will be no judicial interference with a Rate Schedule unless the same is unreasonable or discriminatory (See page 39, Appellee's Brief).

Appellees insist that a proper answer for argument No. 3 of appellant is to call the same a windmill. Appellee meets with neither logic nor authority the arguments and problems raised by appellant. Therefore, presumably appellant's argument No. 3 stands as it originally did.

The District Judge found apparently that *a consumer is entitled to multiple metering or conjunctive billing except where multiple meters were installed at the request of the consumer.*

This proposition does not appear in the published rate schedule. It is a "conjunctive billing order" and is, pure and simple, judicial rate making.

The practice of combined or conjunctive billing *must* be defined. Even with precise definition this practice creates discrimination. See *Realty Supervision Company v. Edison Electric,* 1917B, P.U.R., at page 962, and *Re Combined Billing for Electric Service,* 54 P.U.R. (N.S.) 295-306. If it is to apply to one, it must apply to all others similarly situated. Appellant still has many questions in regard to this billing rider should this Court see fit to uphold the new rate promulgated by the District Court:

(1) Relative to the request for single or multiple meters by the consumer:

(a) Does the request have to be made before the utility constructs its distribution system to a new area?

(b) If a distribution system has already been constructed before any request, does the utility have to alter its facilities to meet the request?

(c) Who pays for any alteration necessary to meet the request?

(d) If the consumer originally requests multiple meters and later requests a single meter, does the utility have to comply with the last request?

(2) Is combined billing limited to meters in different buildings on contiguous properties?

(3) Does it make any difference that two buildings located on the same tract may be one-half mile apart, with the utility forced to run a line to each of said buildings and put a meter in each of said buildings?

(4) Does the fact of intervening streets make any difference?

(5) Does the tract have to be occupied by one consumer only?

(6) Does it make any difference if the tracts have been subdivided?

(7) If appellees lease or sell one-half of their buildings to a third party, does the fact they sold these buildings justify the City in then breaking the consumption in half, thereby receiving more revenue for precisely the same service as was rendered before and with absolutely no change in electrical facilities?

See a typical conjunctional billing rider and some similar problems under same in the case of *Re New York Edison Co., et al.,* 10 P.U.R. (N.S.) page 244.

The new rate created by the District Judge which provides for conjunctive billing, when the meters were not installed at the request of the consumer leads us directly into the next argument which is to the effect the District Judge did not find the *"necessary fact"* under the rate structure created by the District Judge. *That is, the District Judge did not find that appellees did or did not request multiple meters.*

(D) Appellee fails to meet Appellant's argument relative to the sufficiency of Findings of Fact and Conclusions of Law of the Memorandum Opinion.

(1) Measure of Damages.

Appellants contend in their Argument No. 4 that the District Judge found no measure of damages.

Appellee attempts to answer this, on page 40, by arguing that:

> "The record at pages 89 through 94 discloses the fact that prior to the commencement of taking testimony it was agreed by counsel for appellant City that if appellees were entitled to recover they would be entitled to the difference between the amounts which they had paid under protest and the amount which they would have been required to pay had the proper rate been applied in the proper manner to the operations of appellee corporations."

Appellant did prepare Exhibit "A" and Exhibit "B" as computations of the electrical energy consumed, the amount billed with individual meter readings and the amount that would have been billed had the meter readings been combined. The purpose of these exhibits is set out in the record:

> "Mr. Rader. 'If it please the court, now in both of these exhibits (A & B) I want to make it clear that we are not agreeing that either corporation is entitled to the rates which they contend, but we have for the convenience of the court and for the convenience of the litigants attempted to include them all in one exhibit so as to show the difference. . . .' " (R-87). (Emphasis and parentheses supplied.)
>
> "Mr. Rader. 'And it also shows the difference in what those charges would have been had all the house meters been combined and read as one meter on the consumption indicated month by month. In other words, I think it indicates a difference in the theories of billing . . .' ".

"Mr. Rader. 'That is correct. We have prepared the exhibits. We tried to prepare what they did pay and we tried to follow through their theory consistently as to what they should pay and make the difference which put it all at the court's fingertips. Right there is what we tried to do with these Exhibits A and B.' " (R-91.)

Appellant does not believe it admitted that appellees, if entitled to recover, would be entitled to recover the *difference* in what they paid under the city's theory and what they claim they would have paid with a conjunctive billing rate. The exhibits (A & B) were submitted to the court and were prepared by appellant for the convenience of the court and litigants. If appellees are entitled to recover anything, the difference in the established rate and the rate appellees claim is an "evidentiary fact" to be considered by the court in determining damages. Justice Cardozo, in the case of *Interstate Commerce Commission v. United States ex rel. Campbell* (1933), 289 U.S. 385, 389, 390, stated that the difference in rates is only an "evidentiary fact" and is not the measure of damages in a discrimination case. (For a full discussion of this case see appellant's opening brief, page 47.)

(2) Injunctive Relief.

The District Court failed to find any right in appellee to injunctive relief. In this regard merely see the opinion of the District Judge.

(3) Request for Multiple Meters.

The District Judge failed to find whether or not "multiple meters were installed at the request of the consumer." (R-49).

Appellant argued in its opening brief, on pages 44 and 45, as follows:

> "In construing the language of Judge Folta's Memorandum Opinion most favorably to Appellees (R-45, 46, 47, 48, and 49), it is impossible to determine the damages or reparation, if any, to which Appellees are entitled. Judge Folta did find that although the City's practice was not unreasonable, yet the City's definition of establishment as being 'one point variety' (one meter with one point of delivery) was in conflict with Schedule "C" except where multiple meters were installed at the request of the consumer (R-48, 49). *As heretofore noted, this language actually does not entitle the Appellees to any judgment whatsoever inasmuch as there was no finding made by the District Judge as to whether or not the multiple meters were installed at the request of the consumer in the instant litigation, although it appears that after installation Appellees requested a change.*" (Emphasis added.)

An answer to the foregoing is not to be found in appellee's brief. It is submitted that there was no finding relative to this question. It is also submitted that a careful reading of the record would indicate the City of Anchorage appellant actually did install the *multiple* meters at the *request* of the appellees.

Exhibits 6, 7, and 8 are photographs of typical meterboards of the 22, 16 and 12 unit buildings. See appellee's brief, page 6.

"The house meter is shown on the lower left hand corner of the photograph of the 22-meter board and the 12-unit meter board and is the second meter from the right on the 16-unit meter board."

It is submitted that on the record these meter boards *had already been installed* by appellees in their buildings with an individual meter for the house current in each of the buildings *before any communication* with the city officials relative to combined or conjunctive meter readings.

Testimony of Mrs. Hall:

"Q. When did you first talk to Mr. Sharp? (The then City Manager.)

A. I met Mr. Sharp within two days after arrival in Anchorage which was in the early part of April.

Q. I think you stated on direct examination the first time you talked to him was in August, 1951 about rates.

A. The actual speech about rates that I can make a definite reference to was in August, 1951.

Q. At that time some of the buildings were already occupied, weren't they? (Note, See R-175, Initial occupancy in July, 1951.)

A. The buildings were occupied.

Q. So the wiring was completed on those.

A. In August, yes sir, on a portion of the buildings.

Q. And it was completed on a good many of the others, the wiring?

A. It depends on what part of the wiring you are referring to. The last installation was meters. *The panels had been in prior to that time.*" (R-189.) (Emphasis and parentheses supplied.)

It is submitted that appellees constructed their buildings, installed meter panels, each of which meter panels had a meter base for every apartment and *also a meter base for the house power consumed.* The City of Anchorage put a meter on each meter base constructed by appellees. Under these circumstances at whose request were the house meters installed? It would appear that if appellees put in their wiring and installed their meter panels with a separate meter for their house power in each building, and subsequently the meter was installed on that meter base, it is fair to say separate meters were installed on the request of appellees.

This leads us back to appellant's earlier argument that the District Judge acted beyond his judicial capacity when he, in effect, rewrote the rate schedule and created terms and conditions which had never existed before. However, if the opinion is to stand, then it is suggested that the City of Anchorage on this record is entitled to a judgment.

It must be admitted there was some discussion with city officials concerning electrical supply of the properties of appellees back in 1949; however, there was absolutely nothing any more definite than assurance by the City that it would "cooperate" with the appellees in supplying electrical service to them (R-340). There was no mention of multiple meters or conjunctive billing.

(E) Appellant's argument relative to its right to trial by jury.

Under every theory of the law the appellants were entitled to a trial by jury. Appellees attempt to say

hat because injunctive relief was requested there was
o right to a trial by jury. It is suggested that al-
hough injunctive relief was requested the District
udge found no basis for granting the same, and did
ot, in his Memorandum of Opinion, lay the founda-
ion for the same. Injunctive relief was not the essence
f appellees' claims.

III.

PPELLEES' ARGUMENTS INDICATING DISCRIMINATION AND "INCREMENTAL COST" THEORY OF RATE STRUCTURES ARE NOT WELL FOUNDED IN THE RECORD OR IN THE MEMORANDUM OPINION FROM WHICH THIS APPEAL IS TAKEN.

A) Discrimination.

Appellee in regard to discrimination cited certain
ortions of the testimony on page 20 of its brief,
hich is to the effect that there is no difference
etween appellee's apartment buildings and the 1200
Street Apartments and the Mt. McKinley Apart-
ents. Substantially, *each* of appellee's buildings is
ke *each* of the 1200 L Street and the Mt. McKinley
partment buildings. Each has its own individual
eter and each has separate meters for the tenants
f the property. There is only *one* 1200 L Street
partment building and there is only *one* Mt. McKin-
y Apartment building. They are treated precisely
nd exactly as appellee and wired in the same manner
s are appellee's buildings. Appellee cites evidence
the effect that there is no basic difference in the
uildings. That is correct. Where the error creeps
is that for the *one* Mt. McKinley building the City

of Anchorage supplies *one* meter and *one* service drop for *one customer* and applies the rate schedule *once.* In the case of appellees the City of Anchorage installed, supplies, maintains and is responsible for a distribution system that runs to *33* separate buildings with *33* service drops, and *33* individual points of delivery spread over an area of approximately 40 acres, and applies the rate schedule 33 times (i.e., once for each point of delivery).

That is the difference. The Trial Court found no discrimination.

(B) Incremental Costs.

Appellee seeks to influence this Court by an "incremental cost" argument. Appellee argues that inasmuch as the additional cost to the electrical utility system to supply appellees is very small, they should, therefore, in effect be given a new conjunctive or combined billing rate which would reduce appellees' costs. Appellee also recites testimony which indicates the present electrical distribution system is the simplest and best.

We take no issue with the fact that the present distribution system is the simplest and the best. We believe that it is. However, the fact remains that the City of Anchorage is supplying appellees at 33 different points of delivery spread over 40 acres of land. If appellees are *not* going to help pay for that distribution system as any other customer of the City of Anchorage, then certainly, from the appellant's point of view (the electrical utility), it should no longer

serve 33 points over 40 acres, but should rather serve only *one* point and force the appellees to build their own distribution system within their own project (R-313, 314). This, of course, would cost the appellees a substantial amount of money. It would also not be the *simplest* and *best way* of supplying electrical energy to appellees. It is submitted that in practically all circumstances one distribution system supplying all consumers to each point of delivery and use is the simplest and best type of distribution system. Rate structures are not predicated on incremental costs but rather on average costs (R-386, 387, 388). However, appellee's incremental costs propositions, which are indicated indirectly by its brief, will avail it nothing for the reason that the District Judge, in his Memorandum Opinion, refused to dignify appellee's contention and omits any reference to the same.

IV.

THE AUTHORITY CITED BY APPELLEE IN ITS ARGUMENT IN SUPPORT OF JUDGMENT IS NOT IN POINT AND CAN BE DISTINGUISHED.

Appellee commences its argument in support of judgment on page 22 of its brief and concludes the same on page 29 of its brief. The first case which appellee cites in reference to the merits of the problems of conjunctive billing is *Florence Laundry Company v. Missoula Light & Power Company*, *1925B Public Utilities Reports*, page 690. Appellee states the *Florence* case is "almost exactly in point with the

facts of this case." (Appellee's brief, p. 24). We do not agree. The *Florence* case involved the supplying of water by a public utility. Florence Laundry Company was originally supplied through one meter and through one service connection. The laundry acquired a second building across an alley, the water supply to which was connected to their first and original building. With the additional use the service connection existing was unsatisfactory, therefore, a second service connection was made.

> "The waters from these two sources were actually *mingled* in water storage tanks in use in the laundry's business." (Page 692.) (Emphasis is supplied.)

In the case at bar the supply of electricity to each of appellees' 33 points over 40 acres is not mingled, so to speak, inasmuch as at each of the 33 points of delivery there is a completely separate and individual distribution and use. The court also noted in the *Florence* case that:

> "In this instance all the water was furnished to one corporation, to-wit, the Florence Laundry Company, for identical use, to-wit, laundry purposes, *all under the same roof or at least at points so near together as to defy distinction* for and on account of distance and cost of service . . ." (Page 694.) (Emphasis supplied.)
>
> "There is no distinction between the two services or between the purposes of the two meters, save the *accidental circumstances* of installation some years apart and at a short distance apart . . ."

> "Indeed, it is evident that the company has *combined the meter readings in other businesses* where differences in points of installation, etc., were and are no more marked than in this case." (Page 694.) (Emphasis supplied.)

Further distinctions in the *Florence* case and in the case at bar are manifest.

(a) In the case at bar the points of delivery are spread over forty acres and are not "under the same roof, or, at least, at points so near together as to defy distinction . . ."

(b) The installation of the distribution system to appellees' 33 points of delivery over 40 acres was not an "accidental circumstance of installation."

(c) In the *Florence* case the company had combined the meter readings in other instances under similar circumstances. In the case at bar there is absolutely no evidence in the record that appellant ever combined meter readings for any person. *In the Florence case the Commission actually found discrimination!* In the case at bar there is a complete absence of a showing of any discrimination. The Commission cited with approval *Supervision Company v. Public Service Electric Company* (N.J.) P.U.R. 1922 D, 555, and said that:

> "The New Jersey Commission held that a company owning a group of nineteen stores, a detached building and a garage *is not entitled to a combined rate*, when the plan of the building structures indicate separate and distinct stores, with separate deliveries and with nothing in com-

> mon except the fact that they are under a continuous roof." (Page 694.) (Emphasis supplied.)

By analogy in the case at bar we have a group of 33 apartment houses (instead of stores), a detached building (the office of one appellee) and the plan of the building structures indicates separate and distinct apartment buildings, with separate deliveries, (Exhibit "H"), and with *not even a common roof.* This appears to be authority supporting appellant, not appellee, for in that case combined billing was refused, even with the additional fact of a common roof.

The appellees next cite the case of *Esmerelda Power Company v. Nevada,* P.U.R. 1920E, 388. The *Esmerelda* case holds that the Esmerelda Power Company is entitled to the same rate as the Tonopah company *similarly situated* (p. 390). The Commission also found that:

> "The synchronous motor generator set of the Esmerelda Power Company is, at this time, an asset of value to the Nevada California Power Company in maintaining satisfactory service. The *concession in rates,* and allowance of the electric current for operating the set, are made in recognition of this view." (p. 391.) (Emphasis supplied.)

This decision leaves much to be desired in the way of statement of pertinent facts. It is impossible to say whether the Esmerelda Power Company was permitted to combine two meter readings because of the necessity for being on the same rate as the Tonopah Extension Mining Company or whether the "conces-

sion in rates" refers to the combined metering or to some other issue in the case. The decision does not state the physical location of the meters it permits to be combined. It does not state whether or not such a practice has been permitted in the past by the utility company or whether the utility company had any rule or regulation concerning the same. The reported decision does not even set out the rate schedules under discussion nor appear to give the essential wording of the same. *It is impossible for appellee to say that it is within the facts of this decision when the facts are not given in the decision itself.*

Appellee next cites (p. 26) *Colonial Gardens Corporation v. Philadelphia Suburban Water Company* (71 P.U.R. (N.S.) 497 and appealed 64 A. (2d) 500). This case has already been distinguished by appellant on pages 31 and 32 of appellant's opening brief. Briefly, the *Colonial Gardens* case is distinguished by Tariff Rule No. 17 which was being construed and also by the fact that the distribution facilities on the consumer's property were installed, maintained and owned by the *consumer*. In the instant litigation the appellees, the consumers, have constructed absolutely no system on their own property to connect their facilities, but rather left this responsibility and expense to the appellant's utility.

Appellee cites the case of *Bilton Machine Tool Company v. United Illuminating Co.* (148 A. 337, p. 27 of Appellee's brief), and states that the same is:

> "... strong supporting authority for plaintiff's position here."

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Appellee cites the case of *Bilton Machine Tool Company v. United Illuminating Co.* (148 A. 337, p. 27 of Appellee's brief), and states that the same is:

> ". . . strong supporting authority for plaintiff's position here."

It is submitted that this case is not authority for appellee unless appellee can show *discrimination*. The court in the *Bilton Tool Company* case said:

> "Consumers of the defendant of the same class and *similarly situated* with the plaintiff as to equipment were charged upon the basis of a single sliding scale or kilowatt hour and upon a totalized reading of the current consumed measured through the meters used." (Page 339.)

And the court further said:

> "If any corporation using the same power as plaintiff had used, had at this time applied to defendant for service, it would have received service at the current rates on a single sliding scale which would have been billed on one bill." (Page 340.)

This case says nothing more and nothing less than if the utility company combines bills for one party they must do it for another. Obviously, it is manifestly discriminatory and unjust to refuse to combine meter readings for one customer and not for another similarly situated and the court so held. In the case at bar appellees were unable to submit to this court one instance or one case when combined billing or totalized billing or metering was permitted by the City of Anchorage, and the appellant City of Anchorage even went so far as to show that since 1925 there had been no such thing as combined metering or billing as a matter of uniform policy and practice.

The *Scovill Manufacturing Company* case (64 A. 218) (cited by appellee on page 28 of its brief) was a

case in which the *consumer built, maintained and owned* its own distribution system and possessed its own meters. None of these facts exist in the case at bar. Quite the contrary, in the case at bar the *utility* has the complete responsibility for all distribution systems bringing electrical energy to each of the appellees' 23 separate buildings and points of delivery.

Appellee Panoramic View has stated that the authorities submitted by appellant "are not in point and do not support its position." (Page 32, appellee's brief). Appellee then states that the case of *Land Title Bank & Trust Co. v. Penn Public Utility Commission*, 16 A. (2d) 843, is not in point. This is somewhat odd inasmuch as in the lower court this case was cited by appellee Richardson Vista in a brief as authority for appellees.

CONCLUSION

Appellant's position is briefly stated in the opening paragraphs of this Brief in its "Introductory Restatement of the Case."

Appellant believes the opinion of the Trial Judge is basically in error.

The result of the decision is to upset a utility rate and compound the problems raised by applying the same retroactively. If the new conjunctive billing rider created by the District Court and applied retroactively to 1951 in the instant case is applied retro-

actively to all others similarly situated (as it must be if discrimination is to be prevented) in the words of the District Judge, "disastrous consequences" may well result. If the new conjunctive billing rider were applied only to the future, then perhaps a rate increase per KWH could be made to compensate for loss of revenue resulting from conjunctive billing.

Whether a utility wants (a) *conjunctive* billing riders and an *increased* cost per KWH; or (b) *no conjunctive* billing riders and a *lower* cost per KWH with *both resulting in the same revenue* necessary to maintain the utility, is a matter for the utility to decide, (in this case a public body, the City Council), and not the Courts. *The equation* is thrown out of balance when a low cost per KWH is applied retroactively with a conjunctive billing rider.

The extent of the imbalance created in the necessary equation by conjunctive billing can probably only be determined by a technical rate analysis and continued litigation to determine who requested multiple or single meters, with the retroactive effect retricted only by the Statute of Limitations.

The problems created by the District Court decision are real. Appellants believe that this Court must look to the inevitable results of the same. The judicial system should not engage in rate-making and utility management. The City Council, a governmental unit, has said "no conjunctive billing." The decision of the City Council is admittedly reasonable. The legislative and executive branches of the governmental unit having jurisdiction have acted. Judicial inter-

vention is unnecessary, undesirable and not proper in the law.

The decision of the District Judge should be reversed.

Dated, Anchorage, Alaska,
September 10, 1956.

Respectfully submitted,
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By JOHN L. RADER,
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